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No. 83-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION, ETC., *et al.*,
Petitioners,

v.

CRATON LIDDELL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners, as members of the plaintiff classes, objected that the proposed settlement of this class action to remedy racial segregation and discrimination in public schools of the St. Louis metropolitan area emphasized interdistrict busing to the detriment or frustration of other provisions to improve the schools which will continue to be used by at least one-half of the black student population in the city district. The court of appeals ruled that the district court's approval of the settlement without a reasoned response to petitioners' objections had not deprived them of due process of law because the settlement contains quality education provisions to compensate students who do not bus. (No. 83-1386 Pet. App. A460-A461; No. 83-1721 Pet. App. 71a-72a).

Neither the district court nor the court of appeals made any assessment of the *adequacy* of the quality education provisions to provide comparable programs for those black students who do not bus. Petitioners had not questioned the

"purpose" or the "intent" of the quality education provisions. On the contrary, petitioners questioned only the adequacy of such provisions, particularly in light of the disparagement and avoidance of city schools which may be occasioned by the massive busing of up to 15,000 black students from the city district to suburban districts.

The State of Missouri, *et al.*, petitioners in No. 83-1721, and the City of St. Louis, *et al.*, petitioners in No. 83-1386, as defendants had denied the necessity of both the interdistrict busing and the quality education provisions to remedy any constitutional violations for which they were responsible. Thus, the central issue posed in all three petitions seeking review of the judgment in this case is whether objections by both plaintiff and defendant parties necessitated the careful findings of fact required to ascertain whether the remedies are closely tailored to fit the wrongs at issue. No respondent has claimed that such findings were made. Clearly they were not.

1. The United States suggested that this Court summarily vacate the decision below and remand for further proceedings to supply the necessary findings. The brief for the United States focused on the inadequacy of the record to support the imposition of most of the costs of "settlement" on the State parties as the "primary constitutional wrongdoers." The brief does not explain why the very same findings are not required to support the imposition of the settlement on petitioners' civil rights claims over their objections in the first instance, or why such findings are not also required to impose any responsibility for the cost of the settlement's remedies on the City of St. Louis.[1]

[1] The City's obligation to provide revenue sufficient to fund the city board of education's share of the costs was qualified by the Eighth Circuit to require a prior finding of no alternative source of such revenue for the board. That qualification, however, does not render "premature" the City's petition in No. 83-1386 which fairly presents the question of whether the record is sufficient to support the imposition of responsibility for any remedy on the City even if the Eighth Circuit's qualification can be met.

The issue of cost is inextricably tied to the nature and scope of the relief. As to these petitioners, the brief states only that "there is no reason to believe that the district court failed to consider petitioners' written comments." (U.S. Br. at 34). Surely, the Due Process Clause of the Fifth Amendment requires more than that a district judge silently consider the objections of plaintiff class members before imposing a compromise of their civil rights claims upon them. The Ninth Circuit has held that due process requires a reasoned response to the objections of class members be set forth on the record together with the findings of fact and conclusions of law necessary to support that response. *Mandujano* v. *Basic Vegetable Products, Inc.*, 541 F.2d 832, 835-36 (9th Cir. 1976). The decision below implies it does not and that important question of federal law is squarely presented by the petition.

2. The brief in opposition filed jointly by the respondents other than the United States and the City and State petitioners in Nos. 83-1386 and 83-1721, argues that the interdistrict busing provisions are "wholly voluntary" and "offered on an equal basis to *all* black students" attending one race city schools. (Resp. Br. in Opposition at 28) (emphasis in original). That is misleading. While the interdistrict busing remedy is "offered" to *all* such black students in good standing, the terms of settlement, in fact, make that remedy "available" to no more than *one-half* of such students. (No. 83-1386 Pet. App. at A413-14 and A420; No. 83-1721 Pet. App. at 23a-24a and 30a).[2] Moreover, on the existing record it is difficult, if not impossible, to assess how many of the black students who bus to suburban districts do so on a "wholly voluntary" basis or do

[2] The settlement directly limits the maximum number of black students who must be accepted by any suburban district to 25% of its total students. Statements that 30,000 black students would remain in one-race city schools without the settlement and that up to 15,000 of such students may bus to suburban districts under the settlement are based upon the application of that 25% limit to the anticipated student populations of the city and suburban districts.

so to avoid inferior programs in one race city schools where, as these petitioners assert, the quality education provisions of the settlement are inadequate to compensate those who do not bus.[3] Respondents identified nothing in the record to support their reliance on the court of appeals' conclusory assertion that the district court's lengthy opinion "reveals that it engaged in a reasoned examination" of petitioners' objections. In fact, the district court opinion had summarily noted only that opposition to the settlement existed, that it was not overwhelming in light of the nature of the suit, and that it had been considered. (No. 83-1386 Pet. App. A19-20; No. 83-1721 Pet. App. 113a-115a).

3. The supplemental brief filed by the Liddell respondents completely misapprehended petitioners' position. It suggests that these petitioners argue that "black children cannot learn effectively in a school of all black students." (Supp. Br. for Liddell Resp. in Opposition at 16). On the contrary, petitioners are an association of black parents who generally prefer to keep their children in neighborhood schools except to the extent that busing may be necessary to eliminate the continuing effects of past segregation. The settlement approved by the courts below frustrates their ability to do so. The entire focus of these petitioners' objections was that black students should not have to be bused to a predominantly white school in order to achieve a quality education. They objected to the massive interdistrict

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[3] Respondents challenge petitioners' reliance on *In re General Motors Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979) *cert. denied*, 444 U.S. 870 (1979), as supporting a requirement of fairness to all class members. (Resp. Br. in Opposition at 28 n. 31). They assert that those who declined the GM cash offer received "no relief" whereas, here, those who do not bus receive "substantial relief." This is disingenuous. In terms of constitutional due process, the distinction between an alternative which affords no relief as opposed to comparatively little relief, lacks any meaningful difference. GM, at least, both "offered" the cash payment and, in fact, made that alternative "available" to *all* members of the plaintiff class. Here, the busing remedy is available to no more than *one-half* of the black students in the plaintiff classes.

busing of black students to white schools which the settlement encouraged without any showing of necessity and without any provision of comparable educational programs for those who do not bus.

CONCLUSION

The importance and substantiality of the question presented have not been denied by any respondent. The United States has recognized the inadequacy of the record to support the judgment. The other respondents opposing the petition argued that the interdistrict busing alternative will be "offered" to *all* black students who would otherwise remain in one race city schools. They failed to observe that, in fact, the busing alternative will be made "available" to no more than *one-half* of such students. They identified nothing in the record to support the adequacy of the quality education provisions as an alternative remedy for those who do not bus. Indeed, the inadequacy of the record to support the judgment is so evident that petitioners concur in the suggestion of the United States that summary action by this Court may be in order.

For these reasons and the reasons set out in the petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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